Supreme Court, U.S.
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ALEXANDER L. STEVAS
CLERK

84-285

UNITED STATES SUPREME COURT

WILLIAM C. LAMPTON,	)	Petition for Writ of Certiora
	)	of Certiorari from the United
Petitioner,	)	United States Appellate Court
	)	Seventh Circuit,
vs.	)	Chicago, Illinois
	)	
DON BOSSE,	)	NO: 83 1049
	)	
Respondent.	)	

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether Petitioner was denied due process of law because the prosecutor in his opening statement informed the jury that a witness would testify that he saw a person matching the description of Petitioner walking away from the shooting victim; and the prosecutor failed to produce said witness at trial.

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REFERENCE TO REPORTS

Unpublished Per Curiam Order without oral argument, U.S. Court of Appeals For the Seventh Circuit, May 30, 1984, No. 83 2348

JURISDICTIONAL GROUNDS INVOKED

- Date of Judgment 5-30-84
- Petition for Re-Hearing denial 6-21-84
- 28 U.S.C. 1254

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendmant to the United States Constitution, section 1

> . . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United State; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE PROCEEDING AND FACTS

Course of Proceedings

On April 14, 1981, a Tazewell County Grand Jury indicted the Petitioner for armed violence. After jury trial, the Petitioner was convicted of armed violence and judgment was entered on the same. Petitioner appealed to the Third District Appellate Court of Illinois and that Court affirmed his conviction in a split decision. The Illinois Supreme Court denied the Petitioner's Petition for Leave to File an Appeal. Petitioner petitioned for a Writ of Habeas Corpus in the United States District Court for the Central District of Illinois and his petition was denied on June 17, 1983. Petitioner filed a Notice of Appeal to the Seventh Circuit Court of Appeals on June 29, 1983, and the Certificate of Probable Cause was filed by Judge Mihm on July 8, 1983. The Seventh Circuit Court of Appeals

denied Petitioner's appeal on May 30, 1984, and Petitioner's Motion for Re-hearing was denied on June 21, 1984.

Statement of Facts

The evidence on behalf of the State was that at 4:30 P.M. on April 8, 1981, Petitioner, Edward Lavin, Tom Daly, Bob Ring and John Cowan were drinking beers in Gloria's Tavern in Pekin, Illinois. All these men worked together as tradesmen. (R-1) Lavin and the Petitioner had known each other for thirteen years. The men continued drinking until about 8:30 P.M. Lavin and the Petitioner began arguing over a work related incident and the Petitioner struck Lavin. A pushing match unsued. (R-1) Petitioner left the tavern and when exiting stated "We'll finish this outside later." (R-1)

The others continued drinking. Thirty minutes later the others left the bar. They went into the parking lot to enter Mr. Ring's car. The Petitioner was in the lot and shouted "Lavin, I want to talk to you". Lavin told the others he was going to talk to the Petitioner and try to calm him down. As Lavin

approached the Petitioner, the Petitioner shot him in the stomach with a pistol from a distance of three feet. Lavin fell to the ground. Petitioner walked away. Cowan and Ring came to Lavin's aid. Lavin told them the Petitioner shot him. Lavin then blacked out. The police arrived and took Lavin to the hospital. A .38 caliber slug was removed from Lavin's abdomen. A forensic scientist testified the slug was a .38 caliber slug. (R-1)

When Lavin was in the hospital he would not at first tell the police who shot him. After five or six days Lavin told the police that the Petitioner shot him. (R-1) By then Lavin not only knew the extent of his injuries, but also had conferred with his attorney. When cross-examined, Lavin denied ever telling Cowan or Ring that he did not know who shot him. Also, Lavin disclaimed telling police that on the night of the shooting he was shot as he entered an automobile in the parking lot. (R-1)

The Petitioner presented the testimony of thirteen witnesses. John Cowan's version of the shooting

contradicted Mr. Lavin's account. According to Cowan, Lavin was the first to leave Gloria's Tavern and he did so alone or with Mr. Ring. (R-1) Mr. Ring did not testify. After Lavin's exit, Cowan heard what he thought was a car backfiring. Cowan went outside. Cowan found Lavin lying wounded in the parking lot. Cowan as well as Tom Daly testified that they did not hear the Petitioner say to Mr. Lavin "We'll finish this outside later". Also, Cowan stated that Lavin never told him he was going to talk to the Petitioner in the parking lot. Cowan declared Lavin did not tell him that the Petitioner had shot him. (R-1)

Police Officer Ziegenbein testified that on the night of the shooting Lavin said he did not know who shot him. This was corroborated by Pekin Policeman Roger Davis and Nels Calvert, the emergency room physician who treated Lavin. Both Calvert and Ziegenbein did testify that Lavin was in a state of shock and experiencing pain due to his wound when they talked with him. Also, they said that Mr. Lavin appeared to be in control of his senses. Dr. Robert

Gregorski testified that Lavin's blood alcohol count was 196 when he arrived at the hospital. Such a figure indicates that Lavis was either "drunk" or "under the influence of alcohol" depending upon Mr. Lavin's experience in drinking alcoholic beverages. (R-1)

Petitioner was the next witness. Petitioner denied shooting Lavin. Petitioner admitted fighting at the tavern. Petitioner explained that recently he was demoted at work and felt Lavin should have spoken out against the job action, but he did not. After the fight, Petitioner said he went to the Crazy Horse Saloon in Bartonville some ten miles distance. Petitioner arrived at 9:00 P.M. and spoke with Robert Koeppel about a friend. Petitioner drank some beer. Petitioner left and drove home arriving home approximately 9:30 P.M. Petitioner was arrested in the early morning of April 9, 1981, by Officer Salmon. Officer Salmon said that when informed of the shooting, Petitioner said he never liked Lavin and if he was shot it could not have happened to a nicer person. (R-1)

Robert Koeppel owns the Crazy Horse Saloon in Bartonville. Koeppel remembers talking with Petitioner on that evening sometime between 5:30 and 9:30 P.M. Petitioner's wife testified for the defense. She stated that she was not sure when Petitioner came home on April 8, 1981. When Petitioner entered the home she did recall she was putting the couple's nine year old child to sleep. The child's usual bedtime was 9:30 P.M. Also, Mrs. Lampton said to her knowledge her husband owned only one handgun. (R-1)

In rebutual, Pekin Policeman James Conover gave. He said Petitioner told him that he did not know when he came home on the night of the shooting. (R-1) And Mr. Lavin said the $1,700.00 found on his person when he was shot was money for a debt he had to pay in Court on April 9, 19[illegible]. The police had recovered this money from the victim as well as four pills which the police determined were not controlled substances. (R-1)

Finally, two stipulations were read to the jury. First, Tom Hinds, another Pekin police officer, said that John Cowan told him that he never asked Lavin any

questions when Lavin was lying wounded in the parking lot. This conversation with Officer Hinds occurred on April 8, 1981. In testimony before the Grand Jury, Cowan stated he had asked Lavin who shot him, but Lavin responded, "I don't know." (R-1) In his opening statement, the prosecutor told the jury Bob Ring would testify that he saw a man fitting the Petitioner's physical description walk away from Lavin immediately after the shooting. Mr. Ring never testified. (R-1)

The trial judge instructed the jury to disregard any opening statement or argument not based on the evidence and in closing argument the prosecutor told the jury to ignore the comments concerning Mr. Ring made in his opening statement. (R-1) Prior to trial, Bob Ring was placed on the State's list of witnesses. Thereafter, the prosecution served a Grand Jury Subpoena on Ring. At a pre-trial hearing to quash the subpoenaed, the Assistant State's Attorney asserted that Ring had been subpoenaed because the State believed that he knew more than what he told the police and perhaps

was involved in obstruction of justice. Later during the trial, in discussing whether certain stipulations would be entered, the prosecutor stated that there were certain reasons that he was not going to call Ring as a witness; that Ring had made several inconsistent statements and the prosecutor did not know what Ring would testify to if called as a witness. (R-1)

ARGUMENT

PETITIONER WAS DENIED A FAIR TRIAL IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION BECAUSE THE PROSECUTOR IN HIS OPENING STATEMENT INFORMED THE JURY THAT A WITNESS WOULD TESTIFY THAT HE SAW A MAN MATCHING THE DESCRIPTION OF PETITIONER WALKING AWAY FROM THE SHOOTING VICTIM; AND THE PROSECUTOR FAILED TO PRODUCE SAID WITNESS AT TRIAL.

In order for habeas corpus relief to issue in this case, the Court must determine that the Petitioner was so prejudiced by the conduct of the prosecutor that the Petitioner was denied a fair and impartial trial. The trial must have been so fundamentally unfair as to deny to Petitioner due process of law which is guaranteed by the Fourteenth Amendment to the U.S. Constitution. Donelly v. DeChristoforo, 416 U.S. 637; 40 L Ed. 2d 431; 94 S. Ct. 1868 (1974)

First, the prosecutor's statements were made in bad faith.

Prior to trial, Bob Ring was placed on the State's list of witnesses. (R-1) Thereafter, the prosecution served a Grand Jury Subpoena on Ring. At a pre-trial hearing to quash the subpoena, the Assistant State's Attorney asserted that Ring had been subpoenaed because the State believed that he knew more than he told the police and perhaps was involved in obstruction of justice. Later during the trial in discussing whether certain stipulations would be entered, the prosecutor stated that there were certain reasons that he was not going to call Ring as a witness, that Ring had made several inconsistent statements and that the prosecutor did not know what Ring would testify to if called as a witness. The Record shows that the witness was not called because the prosecution did not know what he would testify to and because he had made inconsistent statements. (R-1)

Certainly, all the reasons given by the prosecutor for not calling the witness, Bob Ring, were known to the

prosecutor prior to his opening statement. If bad faith means knowingly making a false statement, then the prosecutor is in bad faith in this case.

In effect, the prosecutor testified to the jury by telling them of Mr. Ring. The prosecutor testified as to what Mr. Ring would allegedly say. Of course, the Petitioner had no opportunity to cross-examine the prosecutor nor did the Petitioner have an opportunity to confront Bob Ring.

Further, the conduct of the prosecutor was improper and denied Petitioner a fair and impartial trial.

The next question is - What effect should the bad faith of the prosecutor have on this Court's determination?

Logically, the good faith or bad faith of a prosecutor does not have any effect on the jury decision in any case. The state of mind of the prosecutor cannot affect the jury. What affects the jury are the statements of the prosecutor. A prosecutor may in good faith make a statement which greatly prejudices a Defendant and denies a Defendant a fair trial. On the

other hand, a prosecutor may make a statement in bad faith which has no effect on the jury. What affects the jury is the statement itself and not the mental state of the prosecutor.

However, the good faith or bad faith of the prosecutor should still be relevant to the issue before this Court.

Whether the statement by the prosecutor affected the jury does not lend itself to a simple answer. In each case, the Court must, essentially, guess at the answer. The Court cannot get into the minds of each juror and discover what impact the statements had on the juror. As difficult as this determination is, the Court must do it in fairness to the State and the Petitioner. How the Court makes this determination should certainly involve the good faith or bad faith of the prosecutor.

If the Court determines that the statement was made in bad faith, then the prosecutor should have the burden of proving that the statement did not affect the jury verdict.

If the Court determines that the statement was made in good faith, then the Petitioner should have the

burden of proving that the statement did affect the jury verdict.

If the Court cannot determine if the statement was made in good faith or bad faith, then the prosecutor should have the burden of proving it did not affect the jury verdict because he brought about the situation.

The good faith or bad faith of the prosecutor is irrelevant regarding the actual affect the statement has on the jury. The good faith or bad fai f the prosecutor should be relevant regarding the procedure for determining the affect the statement has on the jury.

Lastly, the improper conduct of the prosecutor added substantial and critical weight to the State's case. Even though the Court instructed the jury to disregard the remarks of the prosecutor, the jurors could not banish these statements from their minds. This was a close case. (R-1) This was a case of the identification of the Petitioner as the offender by a single witness, the victim. The credibility of the victim's testimony is a substantially disputed issue

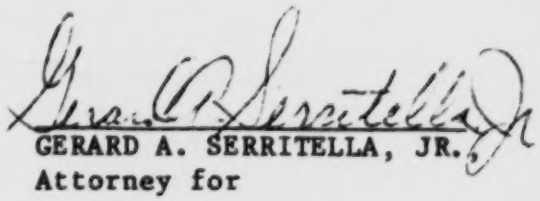
since he did not identify the Petitioner, although well known to him, for nearly five days after the incident had taken place and after earlier indicating he could not identify his assailant. (R-1) Anything tending to corroborate the victim's testimony might well have tipped the credibility balance in favor of the victim and this was the natural effect of representation of Ring's testimony to come. The seed was planted early in the minds of the jurors that a third party had seed someone of the Petitioner's description in the parking lot and the instruction to disregard this thought could not be obviated by an instruction. The instruction of the Court to disregard the statement of the prosecutor could not cure the error because the remarks of the prosecutor substantiated the testimony of the victim so greatly.

The statement of the prosecutor in all probability was the straw that tipped the scales in favor of a guilty verdict in this case.

The conduct of the prosecutor denied the Petitioner a fair and impartial trial.

CONCLUSION

The Petitioner prays that this Court will grant a Writ of Certiorari.



GERARD A. SERRITELLA, JR.
Attorney for

Petitioner

APPENDIX

Order of District Court

Judgment of Appellate Court

Order of Appellate Court

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

WILLIAM C. LAMPTON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 83-1049
	)	
DON BOSSE,	)	
	)	
Respondent.	)	

ORDER

Petitioner seeks habeas corpus relief under 28 U.S.C. §2254 claiming that certain remarks made by the prosecutor in his opening statement denied petitioner a fair trial. Specifically, the petitioner has alleged that the prosecutor informed the jury that a witness would testify that he saw a person matching the description of MR. Lampton walking away from the victim. However, during the trial this witness was never called to testify.

On May 16, 1983, respondent filed a motion for summary judgment to which the petitioner never filed a response. For the following reasons the Respondent's motion is GRANTED.

In order for habeas corpus relief to issue, the Court must determine whether Petitioner was so prejudiced that he was denied a fair and impartial proceeding. (Morrison v. Duckworth, 550 F.Supp. 533 (N.D. Ind. 1982)). The Court should consider the complete trial and not merely the statement made when reaching this determination. Cobb v. Wainwright, 609 F.2d 754 (5th Cir. 1980), cert. denied 442 U.S. 907.

The Court finds that Petitioner was not substantially prejudiced by the prosecutor's remarks. The jury was clearly informed as to how they should consider the remarks made in the opening statements. The prosecutor, defense counsel, as well as the trial judge, stated to the jury that such remarks were not evidence and should be disregarded if not supported by the evidence. People v. Lampton, 108 Ill.App.3d 41, 438 N.E.2d 915 (3rd Dist. 1982). Thus any prejudicial

On May 19, 1993, respondent filed a motion for summary judgment to which the petitioner never filed a response. For the following reasons the Respondent's motion is GRANTED.

In order for habeas corpus relief to issue, the Court must determine whether petitioner was so prejudiced that he was denied a fair and impartial proceeding. (Morrison v. Duckworth, 770 F.Supp. 512 (S.D. Ind. 1991)). The Court should consider the complete trial and not merely the statement made when reaching this determination. Cobb v. Peterson, 809 F.2d 754 (11th Cir. 1987), cert. denied 483 U.S. 907.

The Court finds that Petitioner was not substantially prejudiced by the prosecutor's remarks. The jury was clearly relieved as to how they should consider the remarks made in the opening statements. The prosecutor, defense counsel, as well as the trial judge, stated to the jury that such remarks were not evidence and should be disregarded if not supported by the evidence. People v. Lampton, 106 Ill.App.3d 41, 435 N.E.2d 915 (3rd Dist. 1982). Thus any prejudicial

effect was diminished by these cautioning instructions. (See, United States v. Jones, 592 F.2d 1038 (9th Cir. 1979)). Under similar circumstances, it has been held that erroneous comments by the prosecutor do not rise to the level of due process violations. Asbury v. Peyton, 302 F.Supp. 673 (W.D. Va. 1969). In Asbury, the Petitioner alleged that the prosecutor's reference, in his final statement, to facts not in evidence denied Petitioner a fair and impartial trial. The Court disagreed stating:

> "The guaranty of due process is not a guaranty that every ruling of the trial court will be correct, and simple errors of the trial court in the application of the standard rules of procedure for that court will not constitute a denial of due process of law. Buchalter v. New York, 319 U.S. 427, 63 S.Ct. 1129, 87 L.Ed. 1492 (1943). The court in Buchalter held that, 'the due process clause of the Fourteenth Amendment does not enable us to review errors of state law however material under that law.' Id. at 431, 63 S.Ct. at 1131. Furthermore, concerning statements by the District Attorney to the jury, alleged to be "so unfair as to deprive the trial of the essential quality of an impartial inquiry into [the] guilt' of the accused, the court said, '[T]his does not raise a due process question." Id. at 431, 63 S.Ct. at 1131. And in Soulia v. O'Brien, D.C., 94 F.Supp. 764, affirmed, 1 Cir. 188 F.2d 233, cert. denied

341 U.S. 928, 71 S.Ct. 794, 95 L.Ed. 1359, rehearing denied 341 U.S. 957, 71 S.Ct. 1006, 95 L.Ed. 1378 (1950), the Court again flatly stated, '[E]rrors, with respect to the admission of evidence and comments of the district attorney on the evidence, do not measure up to the dignity of lack of due process.' , Id. at 771."

The statement involved here referred to some testimony which the prosecutor intended to elicit. There is no indication that the statement was made in bad faith (see, Donnelly v. DeChristoforo, 416 U.S. 637 (1974)), in fact, it was not until later, when the prosecutor decided not to call the witness, that the statement actually became erroneous.

While this is an important claim requiring serious consideration by the Court, the Court finds that the prosecutor's remarks did not so contaminate the proceedings as to deny Petitioner due process. Further, any prejudicial effect which may have been projected to the jury was negated by the instructions to the jury.

Consequently, IT IS ORDERED that Defendant's motion for summary judgment is GRANTED.

ENTERED: June 17th, 1983.

Michael M. Mihm
United States District Judge

Unpublished Per Curiam Order
JUDGMENT - WITHOUT ORAL ARGUMENT
UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 30, 1984

Before
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge

WILLIAM C. LAMPTON,	) Appeal from the United States
	) District Court for the
Petitioner-Appellant,	) Central District of Illinois,
	) Peoria Division
No. 83-2348 vs.	)
	)
DON BOSSE,	) No. 83-C-1049
	) Michael M. Mihm, Judge.
Respondent-Appellee.	)

This cause came before the Court for decision on the record from the United States District Court for the Central District of Illinois, Peoria Division.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the order of this Court entered this date.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
(Submitted March 29, 1984)*

UNPUBLISHED ORDER
May 30, 1984 NOT TO BE CITED
PER CIRCUIT RULE 35

Before
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge

WILLIAM C. LAMPTON,	) Appeal from the United States
	) District Court for the
Petitioner-Appellant,	) Central District of Illinois,
	) Peoria Division
No. 83-2348 vs.	)
	)
DON BOSSE,	) No. 83-C-1049
	) Michael M. Mihm, Judge.
Respondent-Appellee.	)

ORDER

Petitioner-appellant William Lampton was convicted of two counts of armed violence and four counts of aggravated battery as a result of a shooting incident. The conviction was affirmed on appeal with one dissent, and leave to appeal to the Illinois Supreme Court was denied. The chief issue on the direct appeal, and the only issue presented in the habeas petition, was

whether a remark made by the prosecutor in his opening statement denied petitioner due process of law. The

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* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." See Rule 34(a), Fed. R. App. P.; Circuit Rule 14(f). No such statement having been filed, the appeal has been submitted on the briefs and record.

district court granted the state's summary judgment motion, finding that petitioner was not prejudiced.

As we understand it from the briefs and the state court opinion (the transcript not being a part of the record), the shooting took place in the parking lot of a bar in which petitioner and four companions -- Lavin, Daly, Ring and Cowan -- had been having an argument. Petitioner left the bar first. Lavin, either alone or

accompanied by Ring, left next. Immediately thereafter, Lavin was shot from a distance of three feet. Lavin did not name petitioner as the assailant until about a week later. Petitioner asserted that he was elsewhere at the time of the shooting.

The parties agree that in his opening statement, the prosecutor stated to the jury that Ring would "testify that he saw a person walking away from Lavin doubled up and he will describe that person to you and his description will match that of the defendant, Mr. Lampton." As it turned out, Mr. Ring was never called to testify. The parties also agree that both the prosecutor in closing argument, and the judge during instructions cautioned the jury that Mr. Ring had not testified and the jury was to disregard the earlier comments concerning his anticipated testimony. The state additionally notes that the prosecutor had prefaced his remarks with the standard "what I am about to say is not evidence" caveat. Petitioner claims that the identification testimony was equivocal, and that despite the disclaimers and cautionary instructions, the

prosecutor's implied promise that Ring would implicate petitioner was a due process violation and enough to tip the scales and result in an erroneous conviction.

Ordinarily we would be handicapped without the state court record, but that record is not necessary to the disposition of the one issue in this case.1/ It is not disputed that the prosecutor made what turned out to be an erroneous evidence forecast in his opening statement, but cautioned that opening statements are not to be considered evidence. Again in his closing argument after the witness was not called, the prosecutor cautioned the jury to ignore the earlier unfulfilled

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1/ Petitioner does not argue that the cautionary instructions were not given, or that in context they were not adequately highlighted. If such questions of fact were raised, it would be necessary to examine the transcript. In this case, petitioner argues only that

as a matter of law the prosecutor's unfulfilled forecast was prejudicial. He also makes no claim that the district court erred in deciding the issue without benefit of the transcript.

opening statement about Mr. King's testimony. Finally, petitioner in his brief specifically concedes that the trial judge instructed the jury to disregard the remarks of the prosecutor, arguing only that the prosecutor's opening comment could not be banished from the minds of the jurors. These facts also are as found by the state appellate court. People v. Lampton, 108 Ill. App. 3d 41, 438 N.E.2d 915 (3rd Dist. 1982).2/

Everything was done by the prosecutor and trial judge that could as a practical matter be done to cure the problem. The judge's instruction alone was sufficient in the circumstances of this case. It is not uncommon for things to change after opening statements during the course of the trial. Those changes do not necessarily constitute prejudice of constitutional magnitude. The circumstances in this case do not render the trial fundamentally unfair. United states ex rel.

Garcia v. Lane, 698 F.2d 900 (7th Cir. 1983).

In Frazier v. Cupp, 394 U.S. 731, 736 (196), the Supreme Court addressed the subject:

> It may be that some remarks included in an opening or closing statement could be so prejudicial that a finding of error, or even constitutional error, would be unavoidable. But here we have no more than an objective summary of evidence which the prosecutor reasonably expected to produce. Many things might happen during the course of the trial which would prevent the presentation of all the evidence described in advance. Certainly, not every variance between the advance description and the actual presentation constitutes reversible error, when a proper limiting instruction has been given.

This court has considered a similar issue before and reached the same result, United States v. Akin, 562 F.2d 1459 (7th Cir. 1977), as has the Ninth Circuit, United States v. Jones, 582 F.2d 1038 (1979).

AFFIRMED.

2/ Because these facts found by the state court are the same facts conceded by the petitioner, we are not relying on the presumption of the correctness of state court findings of fact available under Sumner v. Mata, 449 U.S. 539 (1981). For such reliance it is necessary to determine that the factual findings are "fairly supported by the record." 28 U.S.C. § 2254(d)(8).

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 21, 1984

Before
Hon. HARLINGTON WOOD, JR., Circuit Judge

WILLIAM C. LAMPTON,	) Appeal from the United States
	) District Court for the
Petitioner-Appellant,	) Central District of Illinois,
	) Peoria Division
No. 83-2348 vs.	)
	)
DON BOSSE,	) No. 83-C-1049
	) Michael M. Mihm, Judge.
Respondent-Appellee.	)

This matter comes before the court for its consideration on the "PETITION FOR RECONSIDERATION OF THIS COURT'S MAY 30, 1984 FINAL ORDER AFFIRMING THE DISTRICT COURT'S DENIAL OF A WRIT OF HABEAS CORPUS." filed herein on June 18, 1984, by counsel for the appellant. On consideration thereof,

IT IS ORDERED that said petition is hereby DENIED.

Office-Supreme Court, U.S.
FILED
OCT 30 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-285

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAM C. LAMPTON,

Petitioner,

v.

DON BOSSE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether a remark by the prosecutor during the opening statement at petitioner's state court trial denied petitioner due process of law.

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In The

Supreme Court of the United States

October Term, 1984

WILLIAM C. LAMPTON,

Petitioner,

v.

DON BOSSE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit which affirmed the denial of a writ of habeas corpus by the United States District Court for the Central District of Illinois was an unpublished order dated May 30, 1984. The order has been submitted to this Court as an appendix to the Petition for Writ of Certiorari, and, therefore, is not contained in the Brief in Opposition.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is properly invoked pur suant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner, William C. Lampton, was indicted by the Tazewell County, Illinois, grand jury for attempt murder, two counts of armed violence, and four counts of aggravated battery. Following a jury trial, petitioner was found guilty of two counts of armed violence and four counts of aggravated battery. Petitioner was found not guilty of attempt murder. A judgment of conviction was entered on the findings.

From a judgment of conviction, petitioner took a direct appeal to the Illinois Appellate Court, Third District. On appeal petitioner argued, *inter alia*, that the prosecutor's opening statement denied him a fair trial. The appellate court rejected petitioner's arguments and affirmed the conviction. *People v. Lampton*, 108 Ill. App. 3d 41, 438 N.E.2d 915 (3d Dist. 1982).

Having taken a direct appeal, petitioner filed an application for a writ of habeas corpus in the United States District Court for the Central District of Illinois pursuant to 28 U.S.C. § 2254. Petitioner raised a single ground in support of habeas corpus relief: Whether the prosecutor's remarks made during his opening statement denied peti-

tioner a fair trial. The district court denied petitioner habeas corpus relief based on this claim.

Petitioner appealed the denial of habeas corpus relief to the United States Court of Appeals for the Seventh Circuit. The court affirmed the denial of the petition for writ of habeas corpus in an unpublished order. From this judgment of the Seventh Circuit, petitioner brings the instant petition for a writ of certiorari.

REASON FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The respondent respectfully requests this Court to deny the Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit insofar as the question presented for review involves an application of *Frazier v. Cupp*, 394 U.S. 731 (1969), to the facts of the case. In seeking a writ of certiorari petitioner advances a single question for review. However, the question presented involves application of well-defined decisional law of this Court and federal courts of appeals to the facts of the case. Respondent maintains further review of this cause is unnecessary because the decision below does not depart from established federal precedent. The court fully considered and correctly decided the issue. Respondent further maintains it would not be prudent for this Court to grant certiorari on an issue of such limited importance.

A REMARK BY THE PROSECUTOR DURING THE OPENING STATEMENT AT PETITIONER'S STATE COURT TRIAL DID NOT DENY PETITIONER DUE PROCESS OF LAW.

Petitioner contends he was denied a fair trial when the prosecutor in his opening statement stated to the jury that a witness would testify that he saw a man matching the description of the petitioner walking away from the victim and the prosecutor did not call the witness at trial. (Petition at 14) Respondent maintains that the single statement of the prosecutor was not so prejudicial as to deny petitioner a fair trial.

This Court in *Frazier v. Cupp*, 394 U.S. 731, 736 (1969) articulated the approach to be taken by reviewing courts when a challenge is raised with respect to a prosecutor's statement:

> It may be that some remarks included in an opening or closing statement could be so prejudicial that a finding of error, or even constitutional error, would be unavoidable. But here we have no more than an objective summary of evidence which the prosecutor reasonably expected to produce. Many things might happen during the course of the trial which would prevent the presentation of all the evidence described in advance. Certainly, not every variance between the advance description and the actual presentation constitutes reversible error, when a proper limiting instruction has been given.

Thus, when a claim is advanced by way of a habeas corpus petition of the prosecutor's comments at trial, the Seventh Circuit's standard of review was the narrow standard of due process, not the broad exercise of supervisory power that federal courts of appeals possess in regard to their own trial courts. *Donnelly v. DeChristoforo*, 416 U.S. 637, 642 (1973). As articulated by the

Seventh Circuit, in order for a habeas corpus petitioner to prevail on a claim of prosecutorial misconduct with respect to his opening statement, the alleged error must be one of constitutional magnitude. The remarks of the prosecutor must be so prejudicial that they render the trial fundamentally unfair. *United States ex rel. Garcia v. Lane*, 698 F.2d 900 (7th Cir. 1983).

Respondent maintains that under the circumstances of the case the prosecutor's statement regarding possible testimony of a witness did not prejudice petitioner so as to deny him a fair trial. Petitioner failed to demonstrate that the prosecutor engaged in either persistent and pronounced misconduct or that the evidence presented by the State was so insubstantial that but for the remark no conviction would have resulted.

Moreover, any prejudicial effect was neutralized by the trial court's instruction to the jury to disregard any opening remark not based on evidence subsequently presented at trial. The Seventh Circuit fully considered and correctly decided the claim advanced by petitioner. The decision of the court follows established precedent where the court, relying on *Frazier v. Cupp*, 394 U.S. 731 (1969), held:

> Everything was done by the prosecutor and trial judge that could as a practical matter be done to cure the problem. The judge's instruction alone was sufficient in the circumstances of this case. It is not uncommon for things to change after opening statements during the course of the trial. Those changes do not necessarily constitute prejudice of constitutional magnitude. The circumstances in this case do not render the trial fundamentally unfair.

(Appendix at 10)

CONCLUSION

In view of the foregoing reasons, respondent respectfully requests the petition for writ of certiorari be denied.

Respectfully submitted,

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